UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, DC

IN RE ORDERS ISSUED BY THIS COURT INTERPRETING SECTION 215 OF THE PATRIOT ACT	Docket No. MISC. 13-02

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, AND THE MEDIA FREEDOM AND INFORMATION ACCESS CLINIC FOR THE RELEASE OF COURT RECORDS

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PRELIMINARY STATEMENT

Pursuant to the First Amendment and to Rule 62 of the Foreign Intelligence Surveillance Court's Rules of Procedure ("FISC Rules"), the American Civil Liberties Union ("ACLU") and the Media Freedom and Information Access Clinic at Yale Law School respectfully move for the publication of Foreign Intelligence Surveillance Court ("FISC") opinions evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act, 50 U.S.C. § 1861.[1] On June 6, 2013, the Director of National Intelligence officially acknowledged and declassified details regarding a surveillance program approved by this Court pursuant to that provision. President Obama and members of the congressional intelligence committees have publicly discussed the program and expressly invited a public debate about the legitimacy of the government's surveillance activities. This Court's legal opinions approving the program are of critical importance to that debate. The movants respectfully request that the Court publish the opinions as quickly as possible, with only those redactions that satisfy the stringent First Amendment standard that applies in public-access cases. Alternatively, the Court should exercise its discretion to do so in the public interest.[2]

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[1] "The Patriot Act" is the common name for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).

[2] In 2007, the ACLU filed a motion for public access to certain FISC records, which the Court denied in an opinion signed by Judge John D. Bates. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007). The present motion seeks access to a different set of FISC opinions and presents a new factual and legal record in support of disclosure. As such, it merits consideration by the Court on its own terms. If the earlier decision controls the resolution of this motion, however, the movants respectfully request an order permitting them to seek en banc FISC review or to appeal directly to the Court of Review.

FACTUAL BACKGROUND

Section 215, which amended the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 *et seq.*, empowers the Director of the FBI to obtain secret court orders from the FISC compelling third parties to produce "any tangible things" relevant to authorized foreign-intelligence or terrorism investigations. 50 U.S.C. § 1861(a)(1), (b)(2)(A). The orders are accompanied by a gag order forbidding recipients from disclosing having received the order. 50 U.S.C. § 1861(c)–(d).

Since its enactment, Section 215 has generated considerable public debate. Many have raised concerns about the apparent breadth of the statute (allowing the government to obtain "any tangible things"), its standard for compelled disclosure (relevance to a foreign-intelligence or terrorism investigation), and the indefinite restraints it imposes upon the speech of recipients of disclosure orders. *See, e.g.*, Editorial, *Revising the Patriot Act*, N.Y. Times, Apr. 10, 2005, http://nyti.ms/fQd8sJ ("Section 215 is written far too broadly. It lets the government seize an entire database . . . when it is investigating a single person. . . . If the gag rule remains, it should be limited, so record holders can speak about the search after a suitable period of time, or talk about it right away without revealing who the target was.").

In more recent years, a handful of Senators have said that the government has adopted a secret interpretation of its authority under Section 215, and they have argued forcefully for its disclosure to allow an informed public debate of its necessity and legality. *See, e.g.*, Charlie Savage, *Senators Say Patriot Act is Being Misinterpreted*, N.Y. Times, May 26, 2011, http://nyti.ms/qMTGVx (quoting Sen. Ron Wyden as warning that "[w]hen the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and

they will be angry," and quoting Sen. Mark Udall as stating that "Americans would be alarmed if they knew how this law was being carried out").

A few days ago, The Guardian disclosed a previously secret order from this Court apparently implementing the secret interpretation of Section 215 of which those Senators warned. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, Guardian, June 5, 2013, http://bit.ly/13jsdlb. The order—which was issued on April 25, 2013 and expires on July 19, 2013—directs Verizon Business Network Services, Inc. to produce to the National Security Agency "on an ongoing daily basis . . . all call detail records or 'telephony metadata'" of its customers' calls, including those "wholly within the United States." Secondary Order ("Verizon 215 Order"), *In Re Application of the FBI for an Order Requiring the Production of Tangible Things from Verizon Bus. Network Servs., Inc. on Behalf of MCI Commc'n Servs., Inc. d/b/a Verizon Bus. Servs.*, No. BR 13-80 at 2 (FISC Apr. 25, 2013), *available at* http://bit.ly/11FY393.

In the few days since The Guardian disclosed the order directed at Verizon, federal officials have revealed even greater detail about the government's surveillance under Section 215. On June 6, James Clapper, the Director of National Intelligence ("DNI"), officially acknowledged the authenticity of the order sent to Verizon along with key details about the larger program supported by this Court's orders under Section 215. *See* James R. Clapper, DNI Statement on Recent Unauthorized Disclosures of Classified Information, Office of the Director of National Intelligence (June 6, 2013), http://1.usa.gov/13jwuFc. He stated that: "[t]he judicial order that was disclosed in the press is used to support a sensitive intelligence collection operation"; "[t]he only type of information acquired under the Court's order is telephony metadata, such as telephone numbers dialed and length of calls"; "[t]he [FISC] only allows the

data to be queried when there is a reasonable suspicion, based on specific facts, that the particular basis for the query is associated with a foreign terrorist organization"; and "[t]he [FISC] reviews the program approximately every 90 days." *Id.*

The following day, President Obama also commented publicly on the Section 215 order. Like the DNI, the President stated that "what the intelligence community is doing is looking at phone numbers and durations of calls. They are not looking at people's names, and they're not looking at content." Statement by the President, Office of the Press Secretary (June 7, 2013), http://1.usa.gov/12xerjF. The President also stated that "This program, by the way, is fully overseen not just by Congress, but by the FISA Court—a court specially put together to evaluate classified programs to make sure that the executive branch, or government generally, is not abusing them, and that it's being carried out consistent with the Constitution and rule of law." *Id.*

The President also encouraged the public debate that the revelation of the Section 215 order had provoked:

> I welcome this debate. And I think it's healthy for our democracy. I think it's a sign of maturity, because probably five years ago, six years ago, we might not have been having this debate. And I think it's interesting that there are some folks on the left but also some folks on the right who are now worried about it who weren't very worried about it when there was a Republican President. I think that's good that we're having this discussion.

Id.; *see also* Press Gaggle by Deputy Principal Press Secretary Josh Earnest and Secretary of Education Arne Duncan, Office of the Press Secretary (June 6, 2013), http://1.usa.gov/12xf251 (similar comments).

Finally, members of the congressional intelligence committees have elaborated upon the DNI's statement by confirming that the order issued to Verizon was but a single, three-month order in a much broader, seven-year program that allows the government to collect the telephone records of essentially all Americans. *See, e.g.*, Dan Roberts & Spencer Ackerman, *Senator*

Feinstein: NSA Phone Call Data Collection in Place 'Since 2006,' Guardian, June 6, 2013, http://bit.ly/13rfxdu ("As far as I know, this is the exact three-month renewal of what has been the case for the past seven years. This renewal is carried out by the [foreign intelligence surveillance] court under the business records section of the Patriot Act."); *id.* (Senator Saxby Chambliss: "This has been going on for seven years.").

Like President Obama, Senator Dianne Feinstein—Chairman of the Senate Select Committee on Intelligence and a vocal proponent of the Section 215 program authorized by this Court—has encouraged public debate about the program and any proposed changes to it. Matthew DeLuca & Kasie Hunt, *NSA Snooping Has Foiled Multiple Terror Plots: Feinstein*, NBC News, June 6, 2013, http://nbcnews.to/13rgOl0 ("We are always open to changes. But that doesn't mean there will be any. It does mean that we will look at any ideas, any thoughts, and we do this on everything.").

Despite the extraordinary and increasing public interest in the surveillance program authorized by the Court, the Court's legal opinions evaluating the meaning, scope, and constitutionality of Section 215 and that program in particular remain secret.

JURISDICTION

As an inferior federal court established by Congress under Article III, this Court is vested with inherent powers, including "supervisory power over its own records and files." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *accord Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) ("It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution." (quotation marks omitted)). As this Court has previously determined, the FISC therefore has "jurisdiction in the first instance to

adjudicate a claim of right to the court's very own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 487.

ARGUMENT

I. THE FIRST AMENDMENT COMPELS THE RELEASE OF THE COURT'S LEGAL OPINIONS RELATED TO SECTION 215 OF THE PATRIOT ACT.

A. The First Amendment Right of Access Attaches to Judicial Opinions, Including the Opinions of this Court Interpreting Section 215.

That the judicial process should be as open to the public as possible is a principle enshrined in both the Constitution and the common law. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 564–73 (1980); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) ("The common law right of public access to judicial documents is firmly rooted in our nation's history."); *cf.* Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 Writings of James Madison at 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."). The public's right of access to judicial proceedings and records under the First Amendment is not absolute; while some exclusions may pass constitutional muster, "[w]hat offends the First Amendment" is judicial secrecy imposed "without sufficient justification." *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 296 (2d Cir. 2012). Under the Supreme Court's prevailing "experience and logic" test, the public's qualified First Amendment right of access to judicial proceedings and records attaches where (a) the types of judicial processes or records sought have historically been available to the public, and (b) public access plays a "significant positive role" in the functioning of those proceedings. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9, 11 (1986) ("*Press-Enter. II*"); *see Globe Newspaper v. Superior Court*, 457 U.S. 596, 605–07 (1982); *Wash. Post v. Robinson*, 935 F.2d 282, 287–92 (D.C. Cir. 1991). Here, there is a nearly unbroken tradition of public access to judicial rulings and opinions

interpreting the laws governing the American people and their government. Moreover, publishing judicial opinions interpreting limits on government power—particularly when those opinions construe the scope of domestic surveillance authority—crucially enhances the public's ability to evaluate its representatives and function as an essential check on its government.

In concluding otherwise upon consideration of the ACLU's previous public-access motion to this Court, the Court erred. By limiting the Court's analysis to whether the two published opinions of this Court "establish a tradition of public access" and concluding that "the FISC is not a court whose place or process has historically been open to the public," *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484, 493 (FISA Ct. 2007) (emphasis omitted), the Court failed to identify the proper focus of the "experience" prong of the Supreme Court's test. As that Court has made clear, "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead to the experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (per curiam) (quotation marks omitted). And far from "result[ing] in a diminished flow of information[] to the detriment of the process in question," disclosure of the requested opinions would serve weighty democratic interests by informing the governed about the meaning of public laws enacted on their behalf.

1. "Experience"

When evaluating the First Amendment interests at stake in public-access cases, the proper focus is the *type* of judicial records or process to which a petitioner seeks access, not the past practice of the specific forum. *See, e.g.*, *El Vocero de P.R.*, 508 U.S. at 150; *N.Y. Civil Liberties Union*, 684 F.3d at 301 (rejecting the view that "[t]he *Richmond Newspapers* test looks . . . to the formal description of the forum"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d

83, 94 (2d Cir. 2004) (examining First Amendment right of access to district court "docket sheets and their historical counterparts," beginning with early English courts); *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) (concluding that the experience test includes examining "analogous proceedings and documents"). Here, the types of records at issue are judicial opinions interpreting the meaning of public statutes.[3] And no type of judicial record enjoys as uninterrupted a history of presumptive openness as a judicial opinion. *See Lowenschuss v. W. Pub. Co.*, 542 F.2d 180, 185 (3d Cir. 1976) ("As ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions. . . . Even that part of the law which consists of codified statutes is incomplete without the accompanying body of judicial decisions construing the statutes. Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions." (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 20, 22 (1963))); *see also Scheiner v. Wallace*, 93 Civ. 62, 1996 WL 633226, at *1 (S.D.N.Y. Oct. 31, 1996) ("The public interest in an accountable judiciary generally demands that the reasons for a judgment be exposed to public scrutiny. . . . Therefore, the presumption of public access to" judicial opinions "is particularly high." (citing *United States v. Amodeo*, 71 F.3d 1044, 1048–49 (2d Cir. 1995)). As part of this history, courts have found a qualified First Amendment right of access to judicial opinions construing the government's search and seizure powers. *See In re Application of N.Y. Times Co. for Access to Certain Sealed Court Records*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008) (stating that "routine historical practice countenances in favor of a qualified First Amendment right of access to warrant materials").

[3] This Court therefore erred in previously considering the "experience" test to address only "FISC orders" or "a narrow subset of FISC decisions of broad legal significance," *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 492–93.

2. "Logic"

Just as fundamentally, the "significant positive role" of public judicial decisionmaking in a democracy is so firmly established that it is hardly ever questioned. Public access to judicial opinions promotes confidence in the judicial system by allowing the public to evaluate for itself the operation and decisions of the courts. As the Supreme Court has explained, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Press-Enter. II*, 478 U.S. at 13; *see Richmond Newspapers*, 448 U.S. at 569 (discussing the value of an open justice system and noting that "'[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account'" (alteration in original) (quoting Jeremy Bentham, Rationale of Judicial Evidence 524 (1827))); *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence."); *Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2005) ("[I]n these cases . . . the law itself is on trial, quite as much as the cause which is to be decided. Holding court in public thus assumes a unique significance in a society that commits itself to the rule of law." (quotation marks omitted)); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) ("This preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies." (quotation marks and citations omitted)); *United States v. Ressam,* 221 F. Supp. 2d 1252, 1263 (W.D. Wash. 2002) (explaining that "the general practice of disclosing court orders to the public not only plays a significant role in the judicial process, but is also a fundamental aspect of our country's open administration of justice").

The value in making judicial opinions available to the public only increases where, as here, the subject of such opinions concerns both the power of the Executive Branch and the constitutional rights of citizens.[4] *See F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."); *In re Application for Pen Register & Trap/Trace Device with Cell Site Location Auth.*, 396 F. Supp. 2d 747, 748–49 (S.D. Tex. 2005) ("The underlying order and application have been sealed at the government's request, in order not to jeopardize the ongoing criminal investigation. This opinion will not be sealed, because it concerns a matter of statutory interpretation which does not hinge on the particulars of the underlying investigation. The issue explored here has serious implications for the balance between privacy and law enforcement, and is a matter of first impression in this circuit as well as most others.").

This principle is no less true in the context of national security, where the courts have routinely recognized and given effect to the public's right of access to judicial orders and opinions. Indeed, where matters of national security are at stake, the role of public evaluation of judicial decisions takes on an even weightier role. *See Ressam,* 221 F. Supp. 2d at 1262 (in discussing a protective order in a terrorism prosecution, explaining that "there is a venerable tradition of public access to court orders").

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[4] The Second Circuit has explained that "the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Amodeo*, 71 F.3d at 1049.

Moreover, public release of this Court's legal interpretations of Section 215 would benefit the public interest immensely.[5] As discussed above, the recent disclosures about the Executive Branch's use of its surveillance authority under Section 215 have prompted a renewed debate about that authority—a debate welcomed by both President Obama and members of Congress. Because the Verizon 215 Order merely implements, rather than explains, the government's surveillance authority under Section 215, the release of opinions issued by this Court interpreting that authority would permit the public to more fully understand the order's meaning and to contribute to the ongoing debate, as well as to hold its representatives accountable for their support of or opposition to such authority.

For example, release of Section 215 opinions would allow the public to understand the reach of the statutory term "tangible things," which is not defined in FISA but apparently has been interpreted to include even electronic items. *Compare* 50 U.S.C. § 1861(a)(1) (stating that "tangible things" "include[e] books, records, papers, documents, and other items"), *with* Verizon 215 Order at 2 (stating that "tangible things" include "all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls"). Likewise, disclosure of the Court's opinions would inform ongoing debate about the statutory phrase "relevant to an authorized investigation," 50 U.S.C. § 1861(b)(2)(A), and address confusion as to how the call records of all Americans or all Verizon customers could be "relevant to" an investigation. *See, e.g.*, Amy Davidson, *The N.S.A.–Verizon Scandal, Close Read*, New Yorker (June 6, 2013), http://nyr.kr/ZvnXzM ("Does the government believe that the possibility that someone,

[5] The relief sought by this motion does not, as this Court interpreted the ACLU's 2007 motion, seek "broad public access to FISC proceedings or records," *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 494, but only those opinions that evaluate the meaning, scope, and constitutionality of Section 215.

somewhere, is calling a terrorist makes the entire body of phone calls relevant? If the answer is yes—and I don't think it is—then there is something very wrong with the law."); Benjamin Wittes, *A Correction and a Reiteration*, Lawfare (June 6, 2013, 7:53 PM), http://bit.ly/1baFxv8 ("But here's the problem: if that constitutes relevance for purposes of Section 215 then isn't all data relevant to all investigations?").

The Verizon 215 Order raises other questions about how this Court has interpreted the government's authority under the statute as well:

- Whether a statute authorizing the compelled disclosure of "tangible things" permits essentially real-time surveillance "on an ongoing daily basis"? *See* Verizon 215 Order at 1–2.
- Whether this Court has been asked to, or endeavored to, revisit its legal interpretation of Section 215 in light of the conclusion of five members of the Supreme Court in *United States v. Jones*, 132 S. Ct. 945 (2012), that "longer term" collection of location data or information not ordinarily protected by the Fourth Amendment constitutes a search? *See id.* at 964 (Alito, J., concurring in the judgment for four members of the Court); *id.* at 955 (Sotomayor, J.).
- Whether this Court has examined the application of *Smith v. Maryland*, 442 U.S. 735 (1979), to the mass acquisition of phone records by the government under Section 215?
- Whether this Court has considered the constitutionality of the "gag order" provision of Section 215, 50 U.S.C. § 1861(d), in light of the holding of the Second Circuit that a similar nondisclosure provision in another statute was unconstitutional? *See, e.g.*, *John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008).

Because there is a longstanding American tradition of public access to judicial opinions; because such access positively contributes to the integrity of the judicial process, the democratic legitimacy of this Court, and the public understanding of laws passed in its name; and because the release of opinions interpreting Section 215 would illuminate crucial gaps in the public knowledge about the breadth of its government's surveillance activities under the statute, this

Court should conclude that the public's First Amendment right of access attaches to the Court's legal opinions relating to Section 215.[6]

B. The First Amendment Requires Disclosure of the Court's Opinions Relating to Section 215.

When the First Amendment right of access attaches to judicial documents, strict scrutiny applies to any restriction of that right. *See Globe Newspaper Co.*, 457 U.S. at 606–07; *accord Richmond Newspapers*, 448 U.S. at 581. A court may restrict access only on the basis of a "compelling governmental interest," and only if the denial is "narrowly tailored to serve that interest." *Globe Newspaper Co.*, 457 U.S. at 606–07. Moreover, the burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position. *See Press-Enter. II,* 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by [a] conclusory assertion.").

The government cannot meet the strict-scrutiny test here. With the revelation of the Verizon 215 Order, the President's defense of the government's Section 215 surveillance, and the explanations given by DNI Clapper and members of Congress, the proposition that the

[6] In dismissing the ACLU's prior motion for public access, Judge Bates found it relevant that the Court's opinions could be obtained under the Freedom of Information Act ("FOIA"). On May 31, 2011, the ACLU filed a FOIA request seeking records related to the government's legal interpretation of Section 215, including the legal opinions sought here. Compl. ¶¶ 23–24, *Am. Civil Liberties Union v. FBI*, No. 11 Civ. 7562 (S.D.N.Y. Oct. 26, 2011), ECF No. 1. In subsequent litigation, the government has argued that it may not release "FISC records" under FOIA, because only this Court may do so. Second Supplemental Decl. of Mark A. Bradley at ¶ 12, *Am. Civil Liberties Union v. FBI*, No. 11 Civ. 7562 (S.D.N.Y. Apr. 26, 2013), ECF No. 55. That position contradicts representations made by the government before this Court, in which it insisted that FOIA was "the [o]nly [a]ppropriate [a]venue" for obtaining FISC opinions. Br. for Gov't at 5–7, *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007). The Court credited that argument in rejecting the ACLU's previous motion for access to specific FISC records. *See In re Motion for Release of Court Records*, 526 F. Supp. 2d at 491 n.18, 497. For the reasons explained in this motion, the public's First Amendment right of access attaches to this Court's legal opinions interpreting public laws, irrespective of the government's statutory obligation under FOIA to disclose records in its possession.

government has an interest—let alone a "compelling" one—in preventing the release of this Court's opinions interpreting Section 215 is insupportable.[7] In fact, a fuller accounting of the legal basis for the Verizon 215 Order would *serve* governmental interests by giving context and substance to the content of the order. *Cf.* James R. Clapper, DNI Statement on Recent Unauthorized Disclosures of Classified Information, Office of the Director of National Intelligence (June 6, 2013), http://1.usa.gov/13jwuFc ("DNI Statement") ("The article omits key information regarding how a classified intelligence collection program is used to prevent terrorist attacks and the numerous safeguards that protect privacy and civil liberties. I believe it is important for the American people to understand the limits of this targeted counterterrorism program and the principles that govern its use.").

Of course, portions of the Court's opinions may be sealed to serve compelling governmental interests—for example, to protect intelligence sources and methods that have not been previously disclosed—but the First Amendment requires the Court to ensure that any redactions be narrowly tailored to serve that interest. *Cf. Pepsico, Inc. v. Redmond*, 46 F.3d 29,

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[7] That portions of the opinions sought might be classified is no obstacle to this Court's granting of the relief requested by this motion. The question whether—and to what extent—judicial records must be disclosed is one for the Court to decide, applying the constitutional standard mandated by the First Amendment. *See, e.g.*, *Washington Post Co. v. Soussoudis* , 807 F.2d 383, 391–92 (4th Cir. 1986) ("[T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decisionmaking responsibility to the executive branch whenever national security concerns are present."); *United States v. Rosen*, 487 F. Supp. 2d 703, 716 (E.D. Va. 2007) ("While it is true, as an abstract proposition, that the government's interest in protecting classified information can be a qualifying compelling and overriding interest, it is also true that the government must make a specific showing of harm to national security in specific cases to carry its burden [under the *Press-Enterprise* standard]."). The government does not dispute that federal courts may order the release of classified information where justified. *See* Final Reply Br. of Appellants at 8 n.1, *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, No. 12-5136 (D.C. Cir. Nov. 27, 2012) (stating that the government has not "suggested that the Executive's determination that a document is classified should be conclusive or unreviewable").

31 (7th Cir. 1995) (Easterbrook, J.) ("The judge must make his own decision about what should be confidential (and thus be the subject of oblique reference) and what may be spoken of openly. I regret that this means extra work for the judge, but preserving the principle that judicial opinions are available to the public is worth at least that much sacrifice."). Critical to that analysis will be the numerous disclosures made to date regarding the government's surveillance activities under Section 215: that the government relies upon Section 215 to collect all Americans' call records, that it has been doing so for seven years, that this Court reauthorizes that collection program approximately every ninety days, and that this Court "only allows the data to be queried when there is a reasonable suspicion, based on specific facts, that the particular basis for the query is associated with a foreign terrorist organization." DNI Statement.

II. ALTERNATIVELY, THE COURT SHOULD EXERCISE ITS DISCRETION TO RELEASE ITS LEGAL OPINIONS CONCERNING SECTION 215.

Even if the Court determines that the First Amendment does not require the release of these judicial decisions, the Court's supervisory powers over its own records, as reflected in the FISC Rules, permit the Court to publish its orders and opinions. The movants respectfully request that the Court exercise this authority.

The FISC Rules expressly permit the Court to publish its own orders, opinions, or other decisions "*sua sponte* or on motion by a party request that [they] be published." FISC R.P. 62(a) (2010).[8] Indeed, in 2010, the Court revised its procedural rules to clarify that the Court may

[8] Rule 62 of the FISC Rules, effective November 1, 2010, states:

> (a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion or other decision and redact it as necessary to ensure that

release its orders and opinions without prior Executive Branch approval or review.[9] Moreover, the Court would have authority to grant this motion even in the absence of these rules, because it is fundamental that "every court has supervisory power over its own records and files." *In re Motion for Release of Court Records*, 526 F. Supp. 2d at 486–87 (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)); *see also Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004).

The movants recognize that this Court's docket encompasses a great deal of material that is properly classified. This motion does not seek the disclosure of intelligence targets or, for that matter, any properly classified information. But some matters that come before the FISC raise novel and complex legal issues and, as a consequence, generate legal interpretations of broad significance. The FISC Rules contemplate instances in which the Court can and should provide public access to these decisions—and the Court has, in the past, exercised this power in precisely the manner urged by the movants. On at least three occasions, this Court or the FISA Court of Review ("FISCR") has recognized the public interest in the Court's resolution of such issues and has, accordingly, published its rulings. In the early 1980s, Presiding Judge George Hart published an opinion concerning the Court's authority to issue warrants for physical searches. Letter from Presiding Judge Colleen Kollar-Kotelly to Hon. Patrick J. Leahy, et al. (Aug. 20, 2002) ("Kollar-Kotelly Letter"), *available at* http://bit.ly/114e6SM; *see* James Bamford, The Puzzle Palace: A Report on America's Most Secret Agency (Penguin Books 1983). In 2002, the

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properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

[9] *Compare* FISC R.P. 62(a) (2010) (stating that before publication of an opinion the Court "may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected"), *with* FISC R.P. 5(c) (2006) (stating that before publication of an opinion it "must be reviewed by the Executive Branch and redacted, as necessary, to ensure that properly classified information is appropriately protected").

Court published an en banc decision addressing the government's motion to vacate certain procedures that the Court had previously enforced as "minimization procedures" under 50 U.S.C. § 1801(h). *See* Hon. Kollar-Kotelly Letter.[10]

Most recently, in 2009, the FISCR released a formerly classified opinion because it "addresses and resolves issues of statutory and constitutional significance," because "it would serve the public interest and the orderly administration of justice to publish" the opinion, and because the Court could redact classified material from the opinion without "distorting the content of the discussion of the statutory and constitutional issues." Order, *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01 at 1 (FISA Ct. Rev. Jan. 12, 2009), *available at* http://bit.ly/r32r2W. All of those factors apply with equal force to this motion. At a minimum, the Court's previous disclosures show that the type of tailored, limited publication of the Court's legal reasoning requested here can be accomplished without harm to national security.

The Court's opinions concerning Section 215 plainly address legal issues of similarly broad significance. The broad surveillance power conferred by Section 215 and the unknown reach of several of the statute's terms make any controlling judicial interpretation of the law a matter of acute public concern. The materials sought by this motion are not simply routine FISC orders that granted run-of-the-mill surveillance applications; they are, instead, decisional law fixing the limits of the government's surveillance authority. The opinions are surely, in practice, a clearer statement of what Section 215 does and does not allow than the words in the U.S. Code.

[10] This Court's decision was later appealed by the government, requiring the FISCR to convene for the first time ever. The FISCR published its subsequent order and opinion. *See In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002). The briefs submitted by the government were also made public. *See* Br. for the United States, *In re Sealed Case*, No. 02-001 (Aug. 21, 2002); Supp. Br. for the United States, *In re Sealed Case*, No. 02-001 (Sep. 25, 2002). The briefs are available at http://fas.org/irp/agency/doj/fisa/.

That the release of the Verizon 215 Order came as such a shock to the nation indicates just how uninformed the public has been to date about the scope of the provision.

Access to these legal opinions is thus crucial: the public cannot assess the country's laws, the work of their legislators, or the powers conferred upon their executive officials unless they know what the courts take those laws to mean. In this way, the sealed opinions at issue have far-reaching implications. In "address[ing] and resolv[ing] issues of statutory and constitutional significance," they affect far more than the executive's authority to conduct surveillance in individual foreign intelligence or terrorism investigations. Order, *In re Directives [Redacted] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, No. 08-01 at 1 (FISA Ct/ Rev. Jan. 12, 2009). Disclosure of these opinions, with redactions to protect information that warrants continued sealing, is consistent with the Court's past practice and procedural rules.

Moreover, the recent disclosures relating to the government's surveillance activities under Section 215 eliminate any interest in continued sealing of the Court's legal opinions. As explained above, the President, the Director of National Intelligence, and members of the congressional intelligence committees have revealed the essential details of the program. This Court's rules permit it to publish its legal opinions in precisely these circumstances. At the same time, the Court's previous disclosures exemplify the Court's ability to properly balance the need for disclosure with the government's interest in secrecy in this context. There is no obstacle—either procedural or practical—to releasing FISC opinions that have been carefully redacted to protect specific intelligence interests, so that the public knows the meaning of its laws.

CONCLUSION

For the foregoing reasons, the movants respectfully request that this Court unseal its opinions evaluating the meaning, scope, and constitutionality of Section 215 of the Patriot Act. The movants request that these materials be released as quickly as possible and with only those redactions essential to protect information that the Court determines, after independent review, to warrant continued sealing. Given the relevance of the opinions to an ongoing debate of immense public interest, the movants also request expedited consideration of this motion, as well as oral argument before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alex Abdo, certify that on this day, June 10, 2013, a copy of the foregoing brief was served by UPS on the following persons:

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